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No. 05-1051

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., a Delaware corporation and ADECCO EMPLOYMENT SERVICES, INC., a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO DEFENDANTS' COUNTERSTATEMENTS OF THE CASE

Defendant Motorola argues that because the Court of Appeals noted that Bussell's position "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record" (*Motorola's Response* at 1), this Court should not grant *certiorari* review. No court below ever identified any of the alleged distortions or misrepresentations. In fact, Bussell's Response to Defendants' Motions for Summary Judgment and her Briefs in the Court of Appeals set forth block quoted evidence, much like her statement of the case in her Petition for Certiorari. Those long quotes of record evidence taken from depositions have not been distorted or misrepresented in any way. Rather, it is the Defendants' Statement of the Cases in their Response Briefs that contain distortions and misrepresentations, and they also do not contain a summary of the facts of the case in the light most favorable to Bussell, which is the required standard under Rule 56. Every factual statement made by Bussell to the district court and to the Court of Appeals, to the extent that it was not a block quote, was supported by a correct citation to record evidence.

An example of a misrepresentation of the record by Defendant Motorola is their statement that "[n]o witnesses corroborated Bussell's claims of inappropriate touching." (*Motorola's Response* at 3) (citing Bussell's Appendix at 16a). Contrary to Motorola's representation, Bussell's coworkers (Jarvis Aguilera, Andrew Ducker, Chip Mills) corroborated Bussell's claims. (R2-97-159-60, 166-67; R2-112-255-56; R2-95-48-49; R2-95-74-75, 116-17). Part of the deposition testimony relied on for this proposition shows that Marcy Covington (Motorola's HR manager) specifically had in her notes of Bussell's complaints that she spoke with these people, and they corroborated Bussell's claims.

An example of a distortion of the record by Motorola is their assertion that Bussell only reported the sexual

harassment to Motorola's HR department after she engaged in offensive conduct. (*Motorola's Response* at 3). That is a distortion of the record and is misleading, because, under Motorola's sexual harassment policy, the person to whom Bussell was supposed to report sexual harassment was Laila Pennington, her Motorola supervisor. (R2-116-55). Bussell properly followed this policy by complaining to Pennington. (R2-116-55, 58-59). Although Motorola policy required *Pennington* to bring Bussell's complaint to HR (R2-114-40, 45, 46-47, 52), Pennington did not do so, because she thought she could "just find out what's going on and, you know, take it on my own. . . ." (R2-116-36).

Adecco required (and trained) Tom Karge to immediately investigate any complaint of sexual harassment. (R2-99-22-23). Karge was then required to report the allegation to Motorola's HR and to Adecco's HR in New York. (R2-99-50, 13). The Motorola HR person and the Adecco supervisor were then supposed to coordinate an investigation, because the Motorola HR person would not be allowed to talk to an Adecco employee (and vice-versa) without an Adecco supervisor present. (R2-99-68); (R2-97-20-21, 36, 82-84). Despite this requirement, Motorola and Adecco did not conduct any such joint collaborative investigation into Bussell's claims. (R2-97-194-95, 198). This is so, even though Bussell complained to both Karge (the Adecco supervisor) and Pennington (the Motorola supervisor) repeatedly.

Bussell continually complained to Pennington about the sexual harassment, but every time that Bussell complained, Pennington would call her a liar, a baby, and a problem-causer. (R2-109-189). Pennington would constantly put Bussell down. (R2-109-189). Pennington would yell and scream at Bussell for no legitimate reason, and attempt to get her into trouble with her Adecco supervisor by contriving poor performance allegations, although Bussell did nothing wrong, and was a good employee. (R2-110-197).

Although Bussell testified that she complained to Pennington constantly, Pennington testified that Bussell only complained to her on two occasions. (R2-116-58-59). Pennington has no notes or other evidence that would indicate when, where, or how many times Bussell complained to her. (R2-116-93). Pennington performed absolutely no investigation of Bussell's complaints, and she denied that she knew that there was any harassment occurring. (R2-116-48). Concerning Bussell's "first" complaint to Pennington, Pennington testified as follows: Q: "Did you investigate that [Bussell's complaints of sexual harassment]? A: No." (R2-116-48-49). Pennington did not investigate Bussell's "second" complaint either. (R2-116-60).

In fact, Pennington never even asked Render (one of the main harassers) whether Bussell's allegations of sexual harassment were true. (R2-116-50-51, 70). Pennington testified that she had enough training and knowledge to determine whether an employee is being sexually harassed, but she stated that she did not know whether Bussell was sexually harassed, because she did not do an investigation. (R2-116-133-35). These facts require the conclusion that Bussell complained properly under the Respondents' policies, and the Respondents failed to adequately investigate the complaints.

REASONS FOR GRANTING THE WRIT

I. CONCERNING THE QUESTION PRESENTED PERTAINING TO DIRECT EVIDENCE; (1) BUSSELL PRESENTED HER DIRECT EVIDENCE ARGUMENTS BELOW; (2) THE DIRECT EVIDENCE IS NOT INADMISSIBLE HEARSAY; AND (3) BUSSELL DID SUFFER ADVERSE EMPLOYMENT ACTION.

Initially, the Court should note that Respondent Adecco has admitted that there is a split in the circuits concerning the standard for direct evidence in an employment case, and the effect of such a finding on the case. (*Adecco Brief* at 6).

There is direct evidence of sexual harassment, because both Respondents found that Bussell was sexually harassed; such arguments were clearly raised below, as set forth below. Covington conceded that the offensive comments that Bussell's co-workers told her Render was uttering created a hostile work environment. (*See Petition for Certiorari* at 11-12).

Motorola's Statement to the EEOC stated that "Render was given an incident warning and put on probation for a one year period with the understanding that any further violations of the sexual harassment policy would result in his immediate termination." (R2-116-180-81). Martha Jaramillo, a high-level management official of Motorola, who was the ultimate decision-maker concerning the discipline and resolution arising out of Bussell's complaints, testified that Render "created a hostile work environment discussing strip clubs and making comments and unwanted words." (R2-97-100).

In Karge's (Adecco's on-site supervisor) findings concerning the sexual harassment allegations, Karge found, on January 29, 2001, as follows: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept which was causing her to get ill. . . ." (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them. (R2-112-173-74).

Direct evidence of retaliation exists, because Karge told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . ." (R2-110-268, 168).

There is direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers) testified that Bussell did not quit. (R2-99-92). Brodeur believes

that Bussell was essentially forced out of her employment "due to continuing harassment." (R2-99-168).

These arguments (the foregoing five paragraphs) were clearly raised below. See *Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35).

The comments are not inadmissible hearsay or double hearsay, but rather clearly admissions by a party-opponent, because they come from management personnel discussing employment decisions in the course and scope of their employment. Fed. R. Evid. 801(d)(2).

A former Fifth Circuit case is directly on point here, and requires the conclusion that the evidence in question is not hearsay. In *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir. 1977), the plaintiff-employee's supervisor (Jackson) made a comment over the telephone that was overheard by another employee. The employee's testimony (about what Jackson said) was held to be non-hearsay (under Rule 801(d)(2)(C)), as follows:

> Trial evidence established that Jackson [the main protagonist] was Kingsley's [the plaintiff] superior within the Baker/Beech-Nut Sales Division, that Jackson was responsible for appraising Kingsley's work, and that Jackson reported these evaluations to his superiors who in turn acted upon them. It is clear, therefore, that Jackson had the authority from Baker/Beech-Nut to make the statements quoted from his telephone conversation. . . . Accordingly, Jackson's statements are not excludable hearsay and are admissible.

Kingsley v. Baker/Beech-Nut Corp., 546 F.2d 1136, 1141 (5th Cir. 1977).

Adecco seizes on the fact that Bussell does not claim that she heard the alleged retaliatory statement from Pennington directly. It does not matter, because both

statements are non-hearsay, as they constitute admissions by a party-opponent. As stated, management officials acting in their representative capacities made these statements. Karge, Bussell's supervisor, was instructing Bussell as to what employment decision Pennington decided to make concerning Bussell. The entire context of the conversation was Karge informing Bussell how Pennington was going to retaliate against her. Karge, as Bussell's supervisor, was the appropriate person to tell Bussell of Pennington's decision.

In this case, both prongs of hearsay clearly fall into Rule 801(d)(2)(A)'s scope, because both Karge and Pennington were managing agents. Pennington specifically admitted that she was a manager, and Karge is unquestionably a managing agent, because he supervised 400-500 people at the Motorola job site for Adecco. Accordingly, Bussell's testimony that Karge told her that Pennington told him that Bussell was not going to be made a permanent employee because she complained too much about harassment and retaliation is not hearsay, because neither prong of the two prongs is hearsay, because both prongs consist of statements uttered by managers.

Likewise, *Zaben* does not require the conclusion that Bussell's statement is hearsay. In *Zaben*, two low-level employees heard rumors that unidentified management officials had said that they wanted to get rid of the older workers. *Zaben*, 129 F.3d at 1455. The low-level employees had nothing to do with the employment decision which affected Mr. Zaben. The court found that Zaben's testimony about what the two low-level employees told him "present[ed] a double hearsay problem because the declarants seemed to be repeating what other unidentified, declarants had told them." *Id.* at 1455. Mr. Zaben could not establish a hearsay exception, because he could not identify the declarants. Moreover, the court noted that Mr. Zaben ran into another hearsay problem, that being that the two low-level supervisors had no involvement or

authority over the employment decisions in questions, and therefore were really only repeating rumors.

The *Zaben* case specifically approved of the exact situation in this case as not constituting hearsay, as the court cited approvingly to *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990), noting that "statements by the plaintiff's supervisor about 'the attitude, intentions and/or policy of the higher-ups' in management were properly admitted into evidence." *Id.* at 1456 (citing *Hybert*). The situation in the *Hybert* case that *Zaben* approved, is precisely the situation here, given the relationships between Karge, Bussell's supervisor, and Pennington as Bussell's Motorola supervisor.

Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, as follows:

> A: [After the pulling-down-the-pants incident, which Bussell complained about as being sex harassment]. Yes. I told Tom what had happened. Tom came back to me. All of a sudden, Tom's telling me that both Russ and I are no longer eligible to be made Motorolins [a permanent Motorola employee] because Laila has made it impossible for us.

(R2-109-168). After six to eight months at work, the temporary employees were being made permanent employees. (R2-109-169). Bussell testified as follows:

> Q: Did anyone tell you when you went to Motorola that this was a six-month assignment?
>
> A: Nope. They told us it was temporary, but they said it could be six months to a year to longer, but that we had the opportunity after six months to be transferred to be a Motorolin [a permanent Motorola employee].

(R2-109-183). Bussell was told that she was not going to move up to such a position. (R2-109-265). Again, Defendants' argument that it is undisputed that Bussell could

never have been made a permanent Motorola employee is a disputed issue of material fact.

Bussell clearly suffered adverse employment action, and Motorola admitted that Bussell had her pay docked. (*Motorola's Brief to Eleventh Circuit* at 48) (citing R2-78-159-161). Further, concerning the issue of whether Bussell suffered adverse employment action, the recent case of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) (decided after the *certiorari* petition in this case was filed), held that reassignment of job duties constitutes materially adverse employment action, as does suspension. At a minimum, the *White* case requires that the Court remand to determine in light of *White* whether the adverse employment actions that Bussell endured are actionable. This is because, as argued below (Statement of Facts in Opposition to Summary Judgment at p. 17, ¶ 138) and (Brief on Merits 33-34), Bussell was given 3-5 times the work of others after she complained, was sent home (suspended) without pay (which caused her to suffer economic loss), and she was not made a permanent Motorola employee, which caused her to suffer economic loss. Even under Eleventh Circuit precedent, such economic loss is clearly actionable for a retaliation claim. *Gillis v. Georgia Dep't of Corrections*, 400 F.3d 883 (11th Cir. 2005).

II. THERE IS A SPLIT IN THE CIRCUITS CONCERNING THE APPLICABLE STANDARDS FOR PROVING SEXUAL HARASSMENT, AND BUSSELL DID ARGUE BELOW THAT THE DEFENDANTS' ADMISSIONS (BY THEIR MANAGEMENT OFFICIALS) THAT BUSSELL WAS SEXUALLY HARASSED CONSTITUTE DIRECT EVIDENCE OF SEXUAL HARASSMENT.

Bussell clearly argued below that she had direct evidence of sexual harassment, retaliation, and constructive discharge. See Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment

(pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and Memorandum of Law in Opposition to Summary Judgment (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35). See also (*Petition for En Banc Review* at 15).

Adecco argues that the harassment stopped by December 2000 (*Response* at 9-10), but there is disputed evidence concerning that issue, because Karge admitted that Bussell was still complaining about sexual harassment after the December 26, 2000, meeting she had with Covington, as follows:

> Q: So, was Megan [sic] complaining about harassment after she met with Marcy [Covington] that day?
>
> A: When we met with Marcy was after the meeting and – in about a – two or three days later Meghan came back saying that it's still continuing.

(R2-112-133-34).

Both Respondents deny that there is a split in the circuits concerning the standard for sexual harassment, but they are mistaken, because as pointed out in the Certiorari Petition, numerous courts have held that sexual touchings of one's private parts *per se* constitute sexual harassment, while the courts below did not agree with those holdings. The Respondents merely refer to general circuit restatements of the prima facie for proving sexual harassment for their contention that there is agreement among the circuits. However, several courts have applied a "touchings" rule, and that rule is clearly in dispute in the circuits. (*See Certiorari Petition* at 30).

Further, concerning Motorola's definition of assault as set forth in *Florida Statutes* § 784.011, it is clear that Bussell was assaulted, because she testified that her clothes were ripped off of her (pants ripped down and shirt ripped up). (R2-109-109-10) (Bussell's use of the word rip in her deposition clearly connotes violence).

Finally, Respondents do not respond to Bussell's argument that the Panel decision improperly discounted (and thus is in conflict with other circuits) the sexually harassing conduct by finding that where "the conduct complained of is equally offensive to male and female workers . . . [t]he sexual harassment would not be based on sex because men and women are accorded like treatment". *Panel Decision* at 9 (citing *Cross v. State of Ala.*, 49 F.3d 1490, 1504 (11th Cir. 1995)). The Court should grant *certiorari* on that issue, because it precludes a finding of sexual harassment, as long as the employer comes up with a witness of the opposite sex who can say that he or she was also offended by the conduct. It creates an entirely new affirmative defense to sexual harassment that conflicts with *Faragher*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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